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The Treaty Establishing A Constitution for Europe

Jeremy Lever*

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Abstract

This Article contains some reflections concerning the Draft Treaty establishing a Constitution for Europe (“the Draft Treaty”), which was approved by the European Council on September 28, 2004 and formally signed in Rome on October 29, 2004. At the time of writing in early 2005, it is presently in the process of ratification by the twenty-five Member States of the European Union (“EU”). The Article is primarily concerned with the extent to which the Treaty is a constitution, and its merits and demerits as such. It does not go in any depth into the political desirability of some of the changes made by the Treaty.

THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

*Jeremy Lever**

This Article contains some reflections concerning the Draft Treaty establishing a Constitution for Europe ("the Draft Treaty"),¹ which was approved by the European Council on September 28, 2004 and formally signed in Rome on October 29, 2004. At the time of writing in early 2005, it is presently in the process of ratification by the twenty-five Member States of the European Union ("EU").² The Article is primarily concerned with the extent to which the Treaty *is* a constitution, and its merits and demerits *as such*. It does not go in any depth into the *political desirability* of some of the changes made by the Treaty such as:³

whether the Treaty materially advances the evolution of the EU into a United States of Europe;⁴

whether it will effectively deprive Member States of autonomy in the field of foreign and security policy;⁵

whether it will lead to Member States losing control of their

* KCMG, QC; Monckton Chambers, Gray's Inn, London; and Senior Dean, All Souls College, University of Oxford. The author wishes to thank Professor Roger J. Goebel and Hal Blanchard for their assistance with this Article.

1. Draft Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. C 310/1 (2004) (not yet ratified) [hereinafter Draft Treaty]. The Draft Treaty has been published by the Office for Official Publications of the European Communities (2005).

2. Article IV of the Draft Treaty leaves the method of its ratification to the "respective constitutional requirements" of the individual Member States, a condition which arguably denies it the character of a true constitution. See Draft Treaty, *supra* note 1, art. IV-447(1), O.J. C 310/1 (2004), at 191. A number of countries have already ratified the Draft Treaty: Austria, Belgium, Germany, Greece, Hungary, Italy, Lithuania, Slovakia, Slovenia, and Spain. However, referenda in France and the Netherlands have resulted in "No" majorities.

3. The writer is indebted to the Rt. Hon. John Redwood MP for the identification of many of the issues listed below over the course of a series of seminars sponsored by the Ford Foundation and held at All Souls College.

4. The notion of a fully integrated European entity is nothing new: as early as World War II, Winston Churchill called for a governmental construct to which he referred to as "a kind of United States of Europe." See DESMOND DINAN, *EUROPE RECAST: A HISTORY OF EUROPEAN UNION* 22-25 (2004).

5. Since its formal creation in the Treaty on European Union, effective on November 1, 1993, cooperation in the area of foreign and security policy takes place outside the decision-making procedures of the European Community and on the basis of collaboration between individual Member States. The current consolidated text of the

armed forces and create a European world power in military terms;⁶

whether it will deprive Member States of control over their external borders;⁷

whether it will create a common fiscal regime as well as a common currency throughout the entire EU;⁸

whether it will lead to Member States losing their distinctive justice systems (perhaps to an even greater extent than is the position within the United States of America);⁹

alternatively whether it will ensure much greater respect in practice for the principle of subsidiarity (something that is touched on in this Paper);¹⁰ and

Treaty on European Union ("TEU") sets out the Provisions on a Common Foreign and Security Policy in Title V, Articles 11-28, O.J. C 325/1 (Dec. 24, 2002).

6. Noting the tension between maintaining national sovereignty and developing an assertive EU security presence, the European Council has repeatedly acknowledged the intergovernmental nature of the European Security and Defence Policy ("ESDP") and explicitly laid out those military powers retained by the Member States. See Panos Koutrakos, *Constitutional Idiosyncrasies and Political Realities: The Emerging Security and Defense Policy of the European Union*, 10 COLUM. J. EUR. L. 69, 82 (2003) (pointing out that the policy would not affect the right of the Member States to protect their sovereignty when they deem it to be in danger).

7. The Draft Treaty enables EU legislation governing external border controls, asylum, immigration, and judicial and police cooperation in Articles IV-257 to IV-277. See Draft Treaty, *supra* note 1, art. IV-257 to IV-277, O.J. C 310/1 (2004). See, e.g., Stephen C. Sieberson, *How the New European Union Constitution will Allocate Power between the EU and its Member States: A Textual Analysis*, 37 VAND. J. TRANSNAT'L L. 993, 1034 (2004).

8. After considerable debate, the Draft Treaty text does not materially alter the present European Community Treaty provisions governing the harmonization of taxation. See Draft Treaty, *supra* note 1, arts. III-170 to III-172, O.J. C 310/1 (2004). The United Kingdom and other governments successfully prevented the adoption of text facilitating such harmonization by the introduction of qualified majority voting in the Council. As for the common currency, the Euro, twelve Member States replaced their national currencies with the Euro on January 1, 2002. Protocols 13 and 14 to the Draft Treaty, *supra* note 1, preserve the right of Denmark and the United Kingdom, granted initially by Protocols to the Treaty on European Union, to remain outside the final stage of Monetary Union, retaining their national currencies and preserving the independence of their central banks from the monetary policy control exercised by the European Central Bank. See generally Alexis Krachai et al., *The United Kingdom, in THE EURO IN THE NATIONAL CONTEXT* 319-50 (Jean-Victor Louis ed., 2002).

9. See Draft Treaty, *supra* note 1, art. III-270-74, O.J. C 310/1 (2004), at 118-21 (outlining measures for judicial cooperation in criminal matters).

10. Meant to ensure that the EU does not trample Member States' claims to democratic self-governance and cultural diversity, the principle of subsidiarity calls for EU institutions to refrain from acting, even when constitutionally permitted to do so, if their objectives could effectively be served by action taken at or below the Member State level. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 334 (1994); see also Christian

whether it may not open the door to integration in particular areas of government as between groups of Member States that want to go further than is unanimously agreeable, thus increasing rather than reducing flexibility.¹¹

Since the evolution of the EU will depend as much on the political initiatives and changes agreed to by the governments of the Member States as on the wording of the Treaty itself, the answers to those questions — and whether one views those answers favorably or unfavorably — depend on political judgment as much as on legal analysis. This Paper is primarily concerned with the latter.

However, in this area even what is put forward as legal analysis is almost bound to be colored by the ideological standpoint of the analyst. It is therefore proper that the writer should disclose his own ideological standpoint so that the reader can make allowance for it in what follows.

First, I believe that there are great economic and personal advantages if Europeans can move as freely around Europe as Americans move around the United States, and if a single European market is realized for goods, services and capital.

Secondly, I believe that, especially as globalization has increased, there are many important things that can be done effectively, and sometimes that can be done at all, only at the European rather than the national level and within a legal framework that confers powers on permanently constituted European institutions.

Thirdly, I believe that the primary function of those institutions is to improve the living conditions — economic, environmental and moral — of those who live in Europe when that function cannot be performed effectively, or perhaps at all, by Member States acting separately. I also accept that whether the

Kirchner, *The Principle of Subsidiarity in the Treaty on European Union*, 6 TUL. J. INT'L & COMP. L. 291 (1998). The Draft Treaty's Protocol on the application of the principles of subsidiarity and proportionality largely reproduces the text of the Protocol on Subsidiarity currently annexed to the Treaty on European Union.

11. Title VII of the current Treaty on European Union on Provisions on Closer Cooperation, as amended most recently by the Treaty of Nice (effective February 1, 2003), in Articles 43-45 enables eight or more Member States to engage in "enhanced cooperation between themselves" through use of EU institutions, but only through a complex procedure. The Draft Treaty's Article I-44 on Enhanced Cooperation provides for a somewhat simpler procedure whenever at least one-third of all Member States desire to engage in such cooperation.

function is performed at the European or at the national level, it should be performed with a proper regard for the interests of our fellow humans outside of Europe and for the overall ecology of the world in which we live.

At the same time, I am profoundly unimpressed by ideological objectives that do not contribute to the primary objectives that I have just described. I am also deeply suspicious of the highfalutin demands and claims made by some politicians and some bureaucrats who are largely insulated from the problems that bedevil the ordinary citizen, and who risk becoming a privileged intelligentsia with its own self-congratulating preoccupations. So much for my own "healthy prejudices."

The picture that emerges from the Draft Treaty is a complicated one — as I would argue, excessively so. Even though different commentators have cast light on different parts of the canvas, I have no doubt that honest viewers will perceive the picture differently.¹² I myself started with a completely open mind as to whether the new Treaty was, or was not, at least on balance a good development.

My first conclusion is that what we have been looking at is not a constitution.¹³ Some readers may be familiar with Magritte's picture of a smoker's pipe under which Magritte has inscribed the words, "*Ceci n'est pas une pipe*" ("this is not a pipe").¹⁴ If Magritte were still alive and had been invited to produce a front cover for the Treaty, he might have sensibly included an inscription: "This is not a constitution."

12. Among the many commentators on aspects of the Draft Treaty establishing a Constitution for Europe are, e.g., Anthony Arnull, *The Member States of the European Union and Giscard's Blueprint for Its Future*, 27 *FORDHAM INT'L L.J.* 503 (2004); Jacqueline Dutheil de la Rochere, *The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty*, 41 *COMMON MKT. L. REV.* 345 (2004); Roger Goebel, *The European Union in Transition: The Treaty of Nice in Effect; Enlargement in Sight; A Constitution in Doubt*, 27 *FORDHAM INT'L L.J.* 455 (2004) [hereinafter Goebel, *European Union in Transition*]; Koen Lenaerts & Damien Gerard, *The Structure of the Union According to the Constitution for Europe: The Emperor Is Getting Dressed*, 29 *EUR. L. REV.* 289 (2004); John Temple Lang, *The Main Issues After the Convention on the Constitutional Treaty for Europe*, 27 *FORDHAM INT'L L.J.* 544 (2004); Sieberson, *supra* note 7.

13. Other commentators also conclude that the Draft Treaty establishing a Constitution for Europe is fundamentally in legal terms still a treaty and not a true constitution. See, e.g., Anthony Arnull, *supra* note 12, at 507. For the view that the text moves "away from the realm of international law towards substantial constitutionality," see Lenaerts & Gerard, *supra* note 12, at 297.

14. See RENÉ MAGRITTE, *LA TRAHISON DES IMAGES* [THE TREASON OF IMAGES] (1929).

A few weeks ago I listened to the Lord Chancellor, Lord Falconer of Thoroton, deliver the 2004 Atkin Lecture at the Reform Club in London.¹⁵ The topic about which he spoke was the British government's domestic constitutional "reforms" or "changes," the appropriateness of the description according to the rhetorical purposes in mind.¹⁶ The Lord Chancellor stressed that the Government was entirely against the idea of enacting a written constitution for the United Kingdom.¹⁷ To do so, he said, would impair the sovereignty of the United Kingdom Parliament, prevent the continuing evolution of United Kingdom constitutional principles and practice in light of changing conditions in the world around us, and give excessive power to the judicial branch of government.¹⁸ At the end of the Lord Chancellor's lecture, a member of the audience asked him how he squared those views with the Government's espousal of the projected EU Constitution. That, said the Lord Chancellor, was totally different: a treaty is necessary to define the relationship between twenty-five sovereign States which have come together for a number of purposes, subject to defined conditions.¹⁹

I respectfully agree with the Lord Chancellor that the Draft Treaty is indeed a treaty and not a constitution, though it has constitutional aspects. Those aspects to some extent unavoidably carry with them drawbacks similar to those that led the British Government to eschew the introduction of a written constitution for the United Kingdom. In this respect, the Draft Treaty is not fundamentally different from the earlier European Commu-

15. See Lord Falconer of Thoroton, Atkin Lecture at the Reform Club in London (2004) [hereinafter Atkin Lecture].

16. See, e.g., Sir David Williams, *The Courts and Legislation: Anglo-American Contrasts*, 8 IND. J. GLOBAL LEG. STUD. 323, 325 (2001) (discussing the lack of a formal written constitution and the lack of a federal structure in the United Kingdom); see also Peter L. Fitzgerald, *Constitutional Crisis Over the Proposed Supreme Court for the United Kingdom*, 18 TEMP. INT'L & COMP. L.J. 233 (2004).

17. See Atkin Lecture, *supra* note 15.

18. As the core democratic institution, the British Parliament has retained its ultimate sovereignty over the judiciary, effectively precluding any form of judicial review of its own activities (though not of subordinate legislation). See Ariel L. Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model*, 17 AM. U. INT'L L. REV. 683, 689-90 (2002); see also Fitzgerald, *supra* note 16, at 234 (noting the ability of an unwritten constitution to evolve and adapt to new circumstances over time, as compared to the rigid structure and amendment process of a written constitution such as that of the United States).

19. See Atkin Lecture, *supra* note 15.

nity ("EC")²⁰ and EU treaties, all of which contained constitutional aspects.²¹ To the extent that the initial accession by the United Kingdom to the EC was sold to the British public as signifying no more than joining a free trade area that was rather more integrated than the European Free Trade Area ("EFTA"),²² the prospectus was a false one.²³ Therefore I agree with the distinguished Belgian jurist, Professor Walter van Gerven, that even in its present state the European Community, though not a federation *per se*, is a federal entity.²⁴ That will continue to be true if the Draft Treaty is ratified.

That the Draft Treaty is not itself a constitution is illustrated by the following fact. It is a well-known principle of public international law that, while sovereign States are bound to observe at least a minimum standard of conduct towards citizens of other States, public international law says nothing about the standards of conduct that they are bound to observe in relation to their

20. The current European Community Treaty in consolidated form, as amended most recently by the Treaty of Nice (effective February 1, 2003), is published in O.J. C 325/1 (Dec. 24, 2002) [hereinafter Consolidated EC Treaty].

21. The Court of Justice of the European Communities ("ECJ") has twice described the European Community Treaty and the other two Communities treaties as a "constitutional charter based on the rule of law," notably in Paragraph 21 of Opinion 1/91 on the European Economic Area Treaty, [1991] E.C.R. I-6084. Numerous commentators have agreed with the Court in assessing the present treaties as possessing significant constitutional characteristics. See, e.g., Jean-Claude Piris, *Does the European Union Have a Constitution? Does It Need One?*, 24 EUR. L. REV. 537 (1997) (in which the present Director-General of the Legal Service of the Council presents a legal analysis that concludes that the present treaties have essential elements of a constitution, although far from creating a State as such); Lenaerts & Gerard, *supra* note 12, at 292-93 (reaching the same conclusion).

22. See Convention establishing the European Free Trade Association [hereinafter EFTA], Jan. 4, 1960, 370 U.N.T.S. 5. The United Kingdom and six other Nations founded EFTA in 1960 as a regional mechanism to promote free trade among its members. Subsequently, the United Kingdom and most of the EFTA Nations left EFTA to join the European Community. The EFTA is currently comprised of Iceland, Liechtenstein, Norway, and Switzerland. See The EFTA Secretariat, EFTA at a Glance: Introduction, available at <http://secretariat.efta.int> (last visited Mar. 28, 2005).

23. It is perhaps worth recalling that Lord Bridge's opinion in the well-known case, *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1991] All E.R. 70, [1990] C.M.L.R. 375, declared that the United Kingdom had implicitly accepted the supremacy of Community law as enunciated by the ECJ when it acceded to the European Community, despite public comments to the contrary.

24. See Walter van Gerven, *The Emergence of a Common European Law in the Area of Tort Law: The EU Contribution*, in TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 135-36 (Duncan Fairgrieve et al. eds., 2002) (comparing the jurisprudential relationship between EU law and the law of its Member States, as interpreted by the ECJ, with that between federal law and state law in the United States).

own citizens (subject to exceptions, such as the prohibition of genocide). Therefore, even though public international law prohibits States from treating foreigners worse in certain important respects than they treat their own citizens, it does not prohibit them from treating their own citizens worse in those respects than they are bound to treat foreigners.²⁵

Even though the citizens of Member States are already citizens of the existing EU,²⁶ and will be citizens of the new EU created by the Draft Treaty, the rule of public international law to which I have referred will continue to apply²⁷ so as to enable Member States to practise so-called “reverse discrimination” against their own citizens,²⁸ subject only to specific exceptions created by specific provisions of the Treaty or specific legislative measures taken at the EU level pursuant to such provisions. In other words, it is citizenship of another Member State rather than citizenship of the EU that carries with it constitutional rights within the EU.

In this connection I leave aside the fact that, for quite a long time, citizens of the new acceding Member States will not enjoy freedom of movement of workers in many EU States because that can be dismissed as a merely transitional situation.²⁹ Con-

25. See, e.g., Dr. Klaus-Dieter Borchardt, *Fundamental Rights in the E.U.*, in THE ABC OF COMMUNITY LAW 13, 16 (5th ed. 2000) available at http://europa.eu.int/eur-lex/en/about/abc_en.pdf (last visited Mar. 28, 2005) (noting that the principle of equal treatment does not preclude nationals and home-produced goods from being subject to stricter requirements than citizens or products from other Member States).

26. The principle that all Member State nationals also enjoy citizenship of the Union (or European citizenship, as it is often called), was introduced by the Maastricht Treaty (effective November 1, 1993), and is currently found in Article 17 of the European Community Treaty, *supra* note 20, O.J. C 324/1 (Dec. 24, 2002).

27. See Draft Treaty, *supra* note 1, art. I-10(1), O.J. C 310/1 (2004), at 13-14 (reflecting the current Article 17 in stating that “[c]itizenship of the Union shall be additional to national citizenship and shall not replace it”).

28. The phenomenon of “reverse discrimination” is a consequence of the overriding EC Treaty obligations of free movement of goods, persons, services, and capital. See MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 154 n.7 (1998) (“[w]hen a non-discriminatory national measure is struck down by the Court because it is capable of restricting free trade, it is normally so only with respect to imported products, thus creating discrimination against national products”). For an example of reverse discrimination in the context of free movement of persons, see *Regina v. Saunders*, Case 175/78, [1979] E.C.R. 1129, holding that a UK national confined by court order to residence in Northern Ireland is not a migrant worker and accordingly has no claim to rights under the EC Treaty.

29. Pursuant to the Act Concerning the Conditions of Accession, O.J. L 236/33

sider instead the position of university students in Scotland. Citizens of, for example, the Netherlands and the Republic of Ireland currently enjoy the same privileged treatment with regard to fees as do Scottish residents.³⁰ Residents of Northern Ireland, England and Wales, by contrast, continue to be subject to discrimination.³¹

In other respects too, the Draft Treaty is clearly an *intergovernmental* arrangement rather than the constitution of a *supranational* entity. Quite apart from the enhanced role of the European Council³² (which is comprised of national governments), consider the obligation of the Member States, as such, to provide aid and assistance by all means in their power if any other Member State is the victim of armed aggression on its territory.³³ This obligation is independent of any progress made in framing a "common Union defense policy," let alone achieving a "common defense."³⁴ Moreover, unlike the required response if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster, this mutual defense obligation does not require the EU and its Member States to act jointly.³⁵ In other

(Sept. 23, 2003), which governs the accession of the 10 new Member States that joined the EU on May 1, 2004, Annexes specific to each new State set out transitional measures permitting the current Member States to retain their existing limitations on the free movement of workers and self-employed persons for successive periods cumulating to a maximum of seven years. Almost all the current Member States accordingly have some sort of restriction on free entry and residence for nationals of the new States. See Roger Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 *LOV. U. CHI. INT'L L. REV.* 15, 47-48 (2004).

30. The ECJ concluded that the fundamental right of non-discrimination based on nationality applied to students from any Member State in several well-known judgments. See *Gravier v. City of Liege*, Case 293/83, [1985] E.C.R. 593; see also *Blaizot v. University of Liege*, Case 241/86, [1988] E.C.R. 379. Professor Julian Lonbay provides a useful commentary in Julian Lonbay, *Education and Law: The Community Context*, 14 *EUR. L. REV.* 363 (1989).

31. See Nicholas Christian, *English Student in Legal Fight over Fees*, SCOTLAND ON SUNDAY, Jan. 9, 2005, available at <http://scotlandonsunday.scotsman.com>. The U.S. Supreme Court also permits states to charge out-of-state students higher tuition than state residents. See *Starns v. Malkerson*, 401 U.S. 985 (1971) (per curiam).

32. The current Treaty on European Union's Article 4 gives the European Council a policy-making function, to "define the general political guidelines" of the European Union. See Consolidated EC Treaty, *supra* note 20, art. 4. In a major change, the Draft Treaty's Article I-25 enables the European Council to take legally binding decisions, although Article I-21 forbids it to "exercise legislative functions." Compare *id.* with Draft Treaty, *supra* note 1, arts. I-21 & I-25.

33. See Draft Treaty, *supra* note 1, art. I-41(7), O.J. C 310/1 (2004), at 31.

34. See *id.* art. I-41(2), O.J. C 310/1 (2004), at 30-31.

35. See *id.* art. I-43(1), O.J. C 310/1 (2004), at 32.

words, the relevant provision embodies a mutual *inter-State* defense pact.

One of the many problems in assessing the effects of the Draft Treaty lies in the difficulty of identifying how far, *in practice*, it adds to what is already in place — whether by virtue of the earlier EC and EU Treaties (and, in particular, the Treaty of Nice),³⁶ or by virtue of other international instruments and/or membership in other international organizations. Associated with that problem is the fact that the Draft Treaty contains, like the old ones, a mass of provisions which would normally be found in ordinary (i.e., non-constitutional) legislation.

What is, and is not, included in the Draft Treaty appears to have been determined by historical rather than rational considerations. By way of example, take competition law — and in the interest of simplicity I will leave aside the rules that govern the grant by Member States of State aid.³⁷ What are now Articles 81-86 of the Treaty establishing the European Community³⁸ and were Articles 85-90 of the original Treaty establishing the European Economic Community³⁹ are reenacted in their entirety as Articles III-161 to III-166 of the Draft Treaty.⁴⁰ The Draft Treaty does not include, however, the Council Regulation which rendered control of mergers with an EC dimension part of EC competition law,⁴¹ and which is of equal substantive importance to the Treaty Articles that are concerned with anti-competitive agreements and abuse by undertakings of a dominant position.⁴² Nor does the Draft Treaty contain even a hint that the so-called

36. The Treaty of Nice, signed on February 6, 2001, and effective February 1, 2003, is published in O.J. C 80/1 (Mar. 10, 2001). The current text of the Consolidated Treaty on European Union and the consolidated European Community Treaty include the amendments made by the Treaty of Nice. For an appraisal of the principal institutional modifications produced by the Treaty of Nice, see Goebel, *European Union in Transition*, *supra* note 12.

37. See Draft Treaty, *supra* note 1, art. III-167 to III-169, O.J. C 310/1 (2004), at 71-73.

38. See EC Treaty, arts. 81-86, O.J. C 224/1 (1992), at 64-66.

39. See Treaty establishing the European Economic Community, Mar. 25, 1957, U.N.T.S. 11, arts. 85-90, at 70-74 [hereinafter EEC Treaty].

40. See Draft Treaty, *supra* note 1, art. III-161 to III-166, O.J. C 310/1 (2004), at 68-71.

41. See Council Regulation No. 139/2004, O.J. L 24/1 (2004) [hereinafter EC Merger Regulation], replacing Council Regulation 4064/1989, O.J. L 395/1 (1989).

42. See Draft Treaty, *supra* note 1, art. III-161 to III-166, O.J. C 310/1 (2004), at 68-71.

"Modernization Regulation"⁴³ radically altered the way in which the original basic Treaty provisions are implemented — a change so fundamental in certain respects that the German Monopolkommission formally expressed the view that the change violated the EC Treaty.⁴⁴

I would suggest that any rationally drafted constitution would identify the competence of the EU in the area covered by what is generally called competition law. It would clearly indicate the relationship between EU competition law and the national competition laws of the Member States.⁴⁵ If it is to be generally comprehensible, it would also relegate the EU's extant competition law to a separate EU competition law statute along with implementing regulations. The constitution itself would then simply specify the procedure or procedures for amending the extant legislation. There is no obvious reason why the procedure should be different according to whether the substantive provision was included in the original EEC Treaty and is therefore in the new Draft Treaty or whether, like the Merger Control provisions, it has been subsequently introduced by regulation. But if there were to be some constitutional reason for drawing a distinction, the constitution should do so explicitly rather than, as under the Draft Treaty, by default and as a matter of historical accident.

This criticism is not just that of any elderly, tidy-minded English lawyer. It is precisely the inclusion of a substantial amount of non-constitutional legislative material in the Draft Treaty that contributes to its length and complexity.⁴⁶ According to Sir

43. See Council Regulation No. 1/2003, O.J. L 1/1 (2002).

44. See Commission of the European Communities, White Paper on Reform of Regulation 17: Summary of the Observations, at 6-7 (2000).

45. The implications of Article I-13(1)(b) of the Draft Treaty, that "[t]he Union shall have exclusive competence in . . . the establishing of the competition rules necessary for the functioning of the internal market," were not immediately apparent to me. I now believe, however, that the provision may facilitate the introduction of a Union-wide "leniency regime" and a common "privilege regime" which, to be effective, would need to extend to national as well as EU competition law. On the other hand, Member States will retain the right to have and to implement national competition laws to the extent, and only to the extent, that doing so does not prejudice the functioning of the internal market. This is rather different from the position as it has been understood until now, namely that EU competition law takes precedence. See BELLAMY & CHILD, *EUROPEAN COMMUNITY LAW OF COMPETITION* ¶¶ 10-074 to 10-080 (2001); see also Draft Treaty, *supra* note 1, art. I-13(1)(b), O.J. C 310/1 (2004), at 15.

46. The Commission's Communication, A Constitution for the Union, COM

David Edward, however, it would be both dangerous and counter-productive to relegate what have hitherto been treaty articles to, in effect, a separate corpus of legislation.⁴⁷ Sir David has not persuaded me on this point, but his views always command respect.

In a particular respect the task of the European Constitutional Convention was especially difficult. One of the reasons given by the Lord Chancellor in his recent Atkin Lecture for not enacting a written constitution for the United Kingdom was a desire not to arrest adjustment to changing conditions.⁴⁸ If that is a problem even in the case of an historically long-established and mature State such as the United Kingdom, then it is obvious that it presents fairly intractable problems for an organism such as the EU, the final structure and operation of which were intended by the Convention to remain open. Insofar as the Draft Treaty does not contain non-constitutional legislation, it is therefore often aspirational as much as it is constitutional.

Yet the aspirations often remain bitterly controversial. Some political leaders wish to facilitate and to introduce legislative measures primarily because those measures will provide uniform rules in all Member States,⁴⁹ almost irrespective of whether the introduction of the rules will provide EU citizens with practical benefits; it is enough that the uniformity of the rules will promote the development of the EU into what would be generally recognized as a single, albeit federal, State. For such leaders, the political value of the introduction of a measure at the EU level is not wholly, or perhaps even primarily, dependent on the direct consequences of the introduction of the measure in terms of so-

(2003) 548 Final, commenting on the Convention's initial Draft Constitution, made a similar point in observing that Part III's provisions on Community policies "form a lengthy, uneven and complicated whole which is drafted in a variety of styles and . . . has been superseded by the reality of current policies." *Id.* at 12.

47. Sir David does acknowledge, however, that the Draft Treaty would have benefited greatly from consultation with professional legal draftsmen. See Sir David Edward, Minutes of Evidence taken before European Scrutiny Committee on EU Constitutional Treaty (Nov. 17, 2004), available at <http://www.publications.parliament.uk> (last visited Mar. 28, 2005). Sir David Edward served as judge at the ECJ from 1992 to 2003.

48. See Atkin lecture, *supra* note 15.

49. See, e.g., Robert Weilaard, *EU Leaders Face a Hard Sell of Constitution in Parliament and Streets of Europe*, ASSOC. PRESS WORLDSTREAM, June 20, 2004 (noting French President Jacques Chirac's remarks that he would have preferred to have "gone further . . . down the road of harmonization in social and fiscal areas" but was forced to make compromises).

cial or economic welfare. That is because such politicians believe that the stability of Europe in the face of both internally disruptive forces and externally threatening forces is dependent upon increased European integration, which requires, as they believe, greater uniformity of rules throughout the EU as a whole.

By contrast, other political leaders believe that the introduction of measures at the level of the EU must be justified by reference to the directly beneficial consequences of the measures in question, that uniformity has no independent value, and that often absence of EU rules is itself the best solution because it leaves the political elements within the EU at lower levels free to decide whether they want a rule at all, and if so, the content of that rule. That clash of ideologies existed before the signing of the Draft Treaty, and the Draft Treaty does not resolve the differences; rather, it often seeks to square the circle and thus stores up problems for the future.

Here again, however, it is important to recognize that the Constitutional Convention faced an intractable problem. The only constraint that has any chance of inducing politicians to try to improve the lives of the people for whom they are responsible, rather than pursuing a more or less selfish agenda of their own, is if they must deliver benefits in order to get re-elected and not thrown out at regular intervals. The members of the College of Commissioners are subject to no such constraint. Yet those who excoriate the Commissioners as unelected bureaucrats also most vociferously oppose the Commissioners being made directly electable, or even indirectly electable, through the European Parliament. Hence, a critically important democratic constraint is absent. But at the same time election of the College of Commissioners would detract politically from the status of the Council which has been entrenched by the Draft Treaty so as to lead a number of Continental commentators to describe the Treaty as a triumph for an anti-federalist United Kingdom.⁵⁰

In one important respect, my views about the Draft Treaty have changed in the course of examining it. My initial impres-

50. The current version of Article I-1(1) of the Draft Treaty, for example, mandates the EU to exercise its conferred competences "on a Community basis," as opposed to the previous version requiring it to do so "on a federal basis," suggesting the prevalence of anti-federalist sentiments of many European leaders. See Draft Treaty, *supra* note 1, art. I-1(1), O.J. C 310/1 (2004), at 11.

sion was that it did nothing to create and strengthen effective controls that have as their purpose to ensure that EU institutions operate efficiently, transparently, and honestly. Even the European Court of Justice and the Court of First Instance, which are the least open to criticism of all the institutions, operate inefficiently because of the rule that all written pleadings that are not filed in French must be translated into French.⁵¹ This remains the policy even though the members of these Courts, almost without exception, deal with material filed in the English language with at least equal facility as they deal with material filed in the French language.

Having said that, I am now persuaded that the Draft Treaty offers actual or potential constitutional improvements in several important respects. First, Article I-24(6) provides that the Council of Ministers shall meet in public when it deliberates and votes on draft legislative acts. To that end, each Council meeting shall be divided into two parts dealing with deliberations on legislative acts and non-legislative activities, respectively. By implication, the part of the meeting dealing with deliberation on EU legislative acts, and not just the final casting of votes after the matter has been effectively decided, will be in public.

If the media do their job properly, that constitutional change should make a real contribution to remedying the democratic deficit of which we have for so long now complained. We shall now know, for example, not only by whom the United Kingdom was represented at meetings of the Council of Ministers, but also what, if anything he or she said; who, if anyone, supported the British position; by whom and on what grounds it was opposed; and who voted and in what direction. This change remedies a near-scandalous situation in which a supposedly democratic legislature transacted its business behind closed doors.⁵²

It also seems unlikely that, even if it wished to do so, the Council of Ministers could restrictively interpret its obligation of

51. See David Edward, *How the Court of Justice Works*, 20 EUR. L. REV. 539, 546-47 (1995). Although written documents are available to members, legal secretaries, and law clerks in the language of the case, and parties may argue in any one of the twenty official languages of the EU, all internal documents are still circulated in French.

52. See Article I-50 of the Draft Treaty, which sets out the basic principles for the transparency of Union institutions, bodies, offices, and agencies, emphasizing the statement in Article I-46 on the principle of representative democracy: "Decisions shall be taken as openly and as closely as possible to the citizen." Draft Treaty, *supra* note 1, art. I-50, O.J. C 310/1 (2004).

openness under Article I-24(6) of the Draft Treaty so as to take its effective decisions with regard to legislative proposals behind closed doors and let in the public only for the formal vote that gives legal effect to the informal decision already taken. I say that partly because the expression “draft European legislative acts” is very widely defined by Article 2 of the First Protocol to the new Treaty.⁵³ By providing for scrutiny by the national Parliaments of all EU legislative acts while they are still in draft form, Articles 2 and 3 of the First Protocol offer the second major constitutional improvement to be initiated by the Draft Treaty.⁵⁴ They also enable each national Parliament to deliver a reasoned opinion on whether the draft measure complies with the principle of subsidiarity which, together with the principle of proportionality, is the first of the fundamental principles that the Draft Treaty declares govern the limits of EU competences.⁵⁵ Since the principle of subsidiarity is much more readily applicable as a political principle than it is protectable by Courts through determination of a justiciable issue, this is a major advance in promoting the application of the principle.⁵⁶ If the British Parliament is serious about subsidiarity, it will adequately resource the Parliamentary Committees entrusted with the scrutiny of draft EU legislation.

The third change to be effected by the Draft Treaty, albeit only a potential one, is set forth in Article III-274(1). In order to combat crimes affecting the financial interests of the EU, the provision authorizes the Council to enact a European law — to establish a European Public Prosecutor’s Office (“EPPO”). The Council shall act unanimously after obtaining the consent of the

53. *See id.*, Protocol on the Role of National Parliaments in the European Union, art. 2, O.J. C 310/1 (2004), at 204 (defining “draft European legislative acts” to include “proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act”).

54. *See id.*, Protocol on the Role of National Parliaments in the European Union, arts. 2-3, O.J. C 310/1 (2004), at 204-05.

55. *See id.*, Protocol on the Application of the Principles of Subsidiarity and Proportionality, O.J. C 310/1 (2004), at 207-09.

56. The ECJ has given great deference to the decisions of the Community legislature (the Parliament and the Council acting jointly through co-decision, or the Council acting alone) in application of the principle of subsidiarity. *See Germany v. Parliament & Council*, Case C-233/94, [1997] E.C.R. I-2405 (upholding the Deposit Guarantee Directive against Germany’s claim of a violation of the principle of subsidiarity).

European Parliament. If and when the EPPO is established, it will be responsible for investigating and prosecuting, in the criminal courts of Member States, offenses against the EU's financial interests as determined by the European law. Its competence may, if so agreed unanimously by the Council after obtaining the consent of the European Parliament and consulting the Commission, be extended to cover cross-border and multi-State serious crime.⁵⁷

Alarmists have suggested that, if the EPPO is established, law-abiding British citizens will be at risk of a knock at the door at 3 a.m. by an EU secret police wearing Stasi-type uniform and uncontrolled by our honest British constabulary and judiciary.⁵⁸ This scenario, however, is even less likely than such a knock on the door being made by a secret state police of our own Home Secretary. Far from opposing the establishment of an EPPO, we should agitate in favor of its establishment. No doubt with notable exceptions, Member States are liable to view, with relative equanimity, the dishonest diversion to their own citizens of EU funds — even to be welcomed as a nice little earner — at the expense only of the probably equally dishonest citizens of other Member States.⁵⁹ The EPPO could also be given power to deal with the dishonest diversion of EU funds and the acceptance of corrupt payments by members of the EU institutions. An EPPO would provide us with improved protection in these areas. The fact that the EPPO would be an appendage of Eurojust⁶⁰ would itself provide some safeguard against the EPPO becoming an instrument of oppression rather than, as intended, an instrument of justice.

57. See Draft Treaty, *supra* note 1, art. III-274(4), O.J. C 310/1 (2004), at 121; see also House of Lords, Select Committee on European Union, Twenty-third Report (2004), ¶¶ 90-97.

58. See, e.g., House of Lords, Select Committee on European Union, Sixteenth Report (2004), ¶ 61 (noting the controversy the proposal caused in the House of Lords as well as concerns that the prosecutor's office "might not be accountable . . . democratically").

59. See Commission of the European Communities, Green Paper on Criminal Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor, COM (2001) 715 Final, at 6-8 (detailing the prevalence of fraud in EC institutions).

60. The European Judicial Cooperation Unit ("Eurojust") has been established to facilitate cooperation among Member States' judicial authorities and coordinate prosecutions in the area of organized crime. See *id.* at 64-65 (detailing the EPPO's proposed interaction with Eurojust).

It would no doubt have been unrealistic to have expected the Convention to have proposed for inclusion in the Draft Treaty a further provision for ensuring financial probity and transparency along the following lines: If in a third consecutive year of a College of Commissioners, the Court of Auditors found itself unable to audit the Commission's Accounts or felt it necessary substantially to qualify the audit report, the Commissioners' salaries would be reduced by 20 percent, in a fourth year by 40 percent, and in a fifth year by 60 percent. In conversation with me, a senior Commission official readily accepted that such a provision could be expected to work wonders by enabling the presently toothless Court of Auditors to perform the duty imposed on it by Article I-31 of the Draft Treaty "to ensure good financial management." Instead, however unsuccessful a Commissioner may have been, he or she often returns to his or her home country with a substantial Community pension, often paid on top of a well-remunerated public sector post.⁶¹

My conclusion therefore is that the Draft Treaty is immediately flawed in that it does not comprise a concise statement of constitutional principles but also includes a rag-bag of non-constitutional legislation and a number of non-EU intergovernmental provisions which should have been stripped out of anything that is to be marketed to electorates as a Constitution. In consequence, the Treaty is not at all user-friendly and is liable to aggravate the fears of ordinary citizens who no longer trust the political class to tell them honestly what they are letting themselves in for if they vote to ratify the new Treaty.

On the other hand, the Draft Treaty has the merit of consolidating in a single text a number of earlier documents, reference to which could be inconvenient. Secondly, the new Treaty enables EU law to be modified and, within the limits of the EU's competences, extended without the need for the making of further treaties, though still in important cases only if the Member States unanimously agree.⁶² Thirdly — and this is a respect in which I have become better disposed towards the Draft Treaty —

61. See Vaughne Miller, *Institutional Reform in the European Union*, House of Commons Library Research Paper 99/54, at 11-12 (1999) (detailing past problems with "administrative and organizational transparency" with regard to commissioners' salaries).

62. See Draft Treaty, *supra* note 1, art. IV-444 - IV-445, O.J. C 310/1, at 136-38 (establishing a framework in which certain Treaty amendments can be adopted by the EU

it does contain significant improvements of a constitutional nature compared with the pre-existing position. If the Draft Treaty is ratified, whether with or without changes being agreed to it, an acid test of its efficacy will be whether it prevents EU institutions, and the EU itself, from becoming increasingly the subject of opprobrium such as, in the end, destroyed the Weimar Republic.⁶³

Despite the clear lessons of history, European politicians seem to have lost sight of the fact that the EU, which is a recent creation comprising a multitude of ethnic, linguistic, religious and cultural groups, needs even more than a traditional nation State to be valued by its citizens for the practical benefits that they perceive it to confer on them. Increasingly, citizens of the Member States have perceived the EU to be engaged in officious and unnecessary intermeddling which has simply complicated their lives and added to the costs which in one way or another the citizen has to bear. The Draft Treaty may be capable of reversing that trend. Whether or not it does so, however, will depend on how the EU institutions and the national Parliaments implement the provisions of the Treaty.

Finally, what will happen if, as is likely, the British referendum on the Draft Treaty produces a negative result?⁶⁴ The position will differ according to whether any other Member State or Member States also vote No or whether the United Kingdom is alone in so doing. Ironically, it is likely that the other State that will vote "no" will be France, and that the French will do so on the ground that the Draft Treaty is too "Anglo-Saxon" — which I take, perhaps wrongly, to mean that it does not clear the way for the imposition by Qualified Majority Voting ("QMV") of EU

without the adoption of formal treaties). In important cases, the modification can be achieved only with the unanimous consent of Member States. *See id.*

63. *See generally* ERICH EYCK, A HISTORY OF THE WEIMAR REPUBLIC (1970). Exploiting the insecurity arising from the economic crises of the decade following World War I, Hitler effectively destroyed the Weimar Republic in 1933 with the passing of the Enabling Act, which allowed him to rule by decree. Having issued an emergency decree suspending civil liberties, Hitler effectively replaced the constitution and turned the Weimar Republic into a Fascist dictatorship. *See id.*

64. Great Britain's previous European referendum in 1975 was in favor of continued membership in the European Community. On February 9, 2005, the ratification bill for the Draft Treaty was approved in its second reading by the House of Commons, though its eventual ratification is not expected to take place until 2006. *See* European Commission, The Future of the European Union Debate, available at <http://europa.eu.int> (last visited Mar. 29, 2005).

measures to promote social solidarity along the lines of the Franco-German model. However, I shall assume here that only the United Kingdom votes "no."⁶⁵

I would like to think that the work-product of the Constitutional Convention, which undoubtedly labored long and hard, would, because of the defects and deficiencies in the new Treaty, have cleared the minds of objective and, on the whole, friendly observers such as myself and led to a recognition of the need to go back to the drawing-board to produce a real constitution. But I doubt that that will happen. It would involve too much loss of face by too many people. Also, as I have said, I believe the new Treaty, despite its faults, has important real and potential merits.

Nevertheless, it is unlikely that if there is a "no" vote in a British referendum, the other Member States will tell the United Kingdom simply that it must toe the line or get out. Even if by then we were to have a Conservative government, I would expect a classic fudge to emerge such as to enable the British government to claim a great victory and win a "yes" vote the second time around.

Of two things I am quite sure: If the United Kingdom were to secede from the EU, it would not be allowed to do so on terms that left it perceptibly better off since that would create a highly dangerous precedent for the EU.⁶⁶ Secondly, even if the United Kingdom were to secede on terms that left it not directly worse off, the secession would be a grave misfortune for Europe. I hope that that does not sound ridiculously Anglocentric, to coin a word; but I do believe that the presence of the United Kingdom within the EU is strongly in the European interest. Though the British Isles are offshore islands, we are Europeans, like it or not, and we share the European interest with our mainland neighbors.

65. My assumption has since been falsified. See *supra* note 2. In consequence, the whole future of the Draft Treaty is now in serious doubt.

66. Neither the current Treaty on European Union nor the European Community Treaty contain any provision dealing with the issue of whether States that have joined the EU may subsequently secede, and if so, under what legal process they may do so. The Draft Treaty's Article I-60 on the procedures for a State's voluntary withdrawal from the European Union would not be applicable as such, but might provide some inspiration for the procedure to be used in the event of a UK withdrawal.